MEMORANDUM DECISION

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IN THE
COURT OF APPEALS OF INDIANA

Avion A. Sexton, Sr.,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

June 27, 2023

Court of Appeals Case No. 22A-CR-1494

Appeal from the St. Joseph Superior Court

The Honorable Elizabeth C. Hurley, Judge

Trial Court Cause No. 71D08-2010-F1-14

Memorandum Decision by Judge Tavitas
Judges Bailey and Kenworthy concur.

Tavitas, Judge.

Case Summary

[1] Avion Sexton, Sr. appeals his convictions for neglect of a dependent resulting in death, a Level 1 felony; dealing in a narcotic drug, a Level 2 felony; and possession of a controlled substance, a Class A misdemeanor. Sexton argues that the trial court abused its discretion by denying his motion for severance. Sexton also contends that the evidence is insufficient to sustain his conviction for neglect of a dependent resulting in death. We disagree and affirm Sexton's convictions.

Issues

[2] Sexton raises two issues, which we restate as:

I. Whether the trial court abused its discretion by denying Sexton's motion for severance.

II. Whether the evidence is sufficient to sustain Sexton's conviction for neglect of a dependent resulting in death.

Facts

[3] In June 2020, Sexton lived in South Bend with his girlfriend, Eboni Hosea; their one-year-old son, J.S.; and Sexton's brother, Kentrell Magitt. Sexton's four-year-old son, A.S., often stayed at the residence too. Sexton, Hosea, and the children slept in the loft bedroom, and Magitt slept on the residence's main level.

[4] Sexton owned multiple handguns, which Hosea would occasionally find on the floor and would pick up. The guns were sometimes "within arms reach" of the children. Tr. Vol. III p. 134. Sexton was also dealing drugs, and "sometimes

he had [Hosea] help him" deliver drugs to people. *Id.* at 135. Hosea "used to always tell [Sexton] to put his stuff away." *Id.* at 151.

[5] On the morning of June 18, 2020, Hosea left for an appointment at the nail salon. A short time later, Sexton told Magitt to watch the children for him, and Sexton also left. Magitt was downstairs, and the children were upstairs in the loft bedroom watching television. Magitt turned on his video game and was talking to his mother on the telephone when he heard a gunshot. Magitt went upstairs to check on the children, and A.S. said "I didn't mean to." Tr. Vol. II p. 137. Magitt found J.S. unresponsive with a wound to his head. Maggit also found a handgun, which he removed and placed behind a television downstairs. Magitt called 911, and Hosea arrived at the residence while Magitt was on the phone with 911. Hosea then drove J.S. to the hospital, where J.S. was pronounced dead.

[6] Officer Anthony Dawson of the South Bend Police Department was the first officer on the scene and spoke with Magitt. Magitt told Officer Dawson that A.S. was inside the house; that A.S. was "the one that did it"; and that Magitt placed the handgun behind a television. *Id.* at 106. Because Officer Dawson was concerned that the child could still access the firearm, Officer Dawson and another officer entered the residence.

[7] Just inside the front door, Officer Dawson observed "a magazine to a handgun lying on the ground." *Id.* at 108. On a table in the kitchen, the officer observed a Ruger handgun, a bag that appeared to contain a controlled substance, and a scale. As they proceeded upstairs, A.S. came to the top of the stairs, and the officers removed him from the residence. Upstairs, the officers saw what

appeared to be "brain matter next to [a] mattress." *Id.* at 111. When they went back downstairs, the officers located a Walther handgun behind a television.

[8] A later search of the residence, pursuant to a search warrant, also revealed a box of ammunition on a chair near the entry; an opened handgun box in the upstairs closet; methamphetamine tablets on the television stand; and fentanyl on the kitchen table. Testing revealed that the Walther handgun was the weapon that killed J.S. and that the Walther handgun did not have a manual safety lock. Sexton's and Hosea's DNA was found on both weapons. Sexton's fingerprint was also found on the bag containing the fentanyl.

[9] The State charged Sexton with thirteen counts: Count I, neglect of a dependent resulting in death, a Level 1 felony; Count II, dealing in a narcotic drug, a Level 2 felony; Count III, neglect of a dependent resulting in serious bodily injury, a Level 3 felony; Count IV, dealing in a narcotic drug, a Level 2 felony; Count V, possession of a narcotic drug, a Level 3 felony; Count VI, dealing in a narcotic drug, a Level 4 felony; Count VII, possession of a narcotic drug, a Level 4 felony; Count VIII, neglect of a dependent resulting in bodily injury, a Level 5 felony; Count IX, possession of a narcotic drug, a Level 5 felony; Count X, dealing in a narcotic drug, a Level 5 felony;[1] Count XI, neglect of a dependent, a Level 6 felony; Count XII, possession of a narcotic drug, a Level 6 felony; and Count XIII, possession of a controlled substance, a Class A misdemeanor.

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[1] Some portions of the record have Counts VIII and X switched. For consistency, we will refer to Count VIII as neglect of a dependent resulting in bodily injury, a Level 5 felony, and Count X as dealing in a narcotic drug, a Level 5 felony.

[10] In September 2021, Sexton filed a motion for severance. Sexton requested that Counts I, III, VIII, and XI, which charged neglect of a dependent at various levels, be severed from the remaining drug charges. In January 2022, the trial court denied Sexton's motion to sever. The trial court found that "the evidence the State expects to present at trial is intertwined through all charged offenses, making severance of the charges difficult and impractical." Appellant's App. Vol. II p. 204. The trial court also found that the "trier of fact should be able to distinguish the evidence and apply the law intelligently as to each offense, as required by Ind. Code 35-34-1-11." *Id.*

[11] The jury found Sexton guilty as charged. Due to double jeopardy concerns, the trial court sentenced Sexton only on Count I, neglect of a dependent resulting in death, a Level 1 felony; Count II, dealing in a narcotic drug, a Level 2 felony; and Count XIII, possession of a controlled substance, a Class A misdemeanor. The trial court sentenced Sexton to concurrent sentences of forty years on Count I, twenty-five years on Count II, and one year on Count XIII, for an aggregate sentence of forty years. Sexton now appeals.

Discussion and Decision

I. Severance

[12] Sexton challenges the trial court's denial of his motion for severance. We first note that Indiana Code Section 35-34-1-12(b) provides: "If a defendant's pretrial motion for severance of offenses . . . is overruled, the motion may be renewed on the same grounds before or at the close of all the evidence during trial. The right to severance of offenses or separate trial is waived by failure to renew the motion." Although Sexton filed a pre-trial motion for severance, he did not

renew his motion at trial. Accordingly, this issue is waived. *See, e.g.*, *Ennik v. State*, 40 N.E.3d 868, 875 (Ind. Ct. App. 2015) (holding that, because the defendant did not renew his severance motion during the trial, the issue was waived for appeal), *trans. denied*.

[13] Waiver notwithstanding, we do not find Sexton's argument persuasive. The severance of offenses is governed by Indiana Code Section 35-34-1-11(a), which provides:[2]

> Whenever two (2) or more offenses have been joined for trial in the same indictment or information solely on the ground that they are of the same or similar character, the defendant shall have a right to a severance of the offenses. In all other cases the court, upon motion of the defendant or the prosecutor, shall grant a severance of offenses whenever the court determines that severance is appropriate to promote a fair determination of the defendant's guilt or innocence of each offense considering:
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> (1) the number of offenses charged;
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> (2) the complexity of the evidence to be offered; and
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> (3) whether the trier of fact will be able to distinguish the evidence and apply the law intelligently as to each offense.

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[2] Indiana Code Section 35-34-1-9(a) governs the joinder of offenses and provides:

> Two (2) or more offenses may be joined in the same indictment or information, with each offense stated in a separate count, when the offenses:
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> (1) are of the same or similar character, even if not part of a single scheme or plan; or
>
> (2) are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan.

[14] "The degree of deference owed to a trial court's ruling on a motion for severance depends on the basis for joinder." *Pierce v. State*, 29 N.E.3d 1258, 1264 (Ind. 2015). "Where the offenses have been joined solely because they are of the same or similar character, a defendant is entitled to severance as a matter of right." *Id.* (citing Ind. Code § 35-34-1-11(a)). The trial court has no discretion to deny such a motion, and we will review its decision de novo. *Id.* Sexton, however, does not argue that he was entitled to severance as a matter of right.

[15] Sexton contends that the neglect of a dependent charges should have been tried separately from the drug charges "to avoid the real risk that the jury would use evidence of drug crimes to decide the issue of neglect, or vice versa." Appellant's Br. p. 12. When the offenses have been joined because the defendant's underlying acts are connected together, as here, we review the trial court's decision for an abuse of discretion. *Pierce*, 29 N.E.3d at 1264. Further, the defendant must demonstrate "in light of what actually occurred at trial" that the denial of the motion for severance "subjected him to . . . prejudice." *Jackson v. State*, 938 N.E.2d 29, 37 (Ind. Ct. App. 2010) (quoting *Harvey v. State*, 719 N.E.2d 406, 409 (Ind. App. Ct. 1999)), *trans. denied*.

[16] The neglect of a dependent charges were connected to the drug charges because, when the police investigated the death of J.S., on the day of the shooting, the officers discovered the drugs in the residence. Although there were thirteen charges in all for the jury to consider, most were lesser included offenses, which did not involve considering significant amounts of different evidence, dates, or persons. As a result, the evidence presented by the State was

not overly complex. We are unable to conclude based on the record that the jury was unable to distinguish the evidence or unable to apply the law intelligently as to each offense. We agree with the State that this "was a straightforward case, and it was largely based on evidence found the same day in one location, Sexton's home." Appellee's Br. p. 16. Accordingly, the trial court did not abuse its discretion by denying Sexton's motion for severance.

II. Sufficiency of the Evidence

[17] Sexton challenges the sufficiency of the evidence to sustain his conviction for neglect of a dependent, a Level 1 felony.[3] Sufficiency of evidence claims "warrant a deferential standard, in which we neither reweigh the evidence nor judge witness credibility." *Powell v. State*, 151 N.E.3d 256, 262 (Ind. 2020) (citing *Perry v. State*, 638 N.E.2d 1236, 1242 (Ind. 1994)). "When there are conflicts in the evidence, the jury must resolve them." *Young v. State*, 198 N.E.3d 1172, 1176 (Ind. 2022). We consider only the evidence supporting the judgment and any reasonable inferences drawn from that evidence. *Powell*, 151 N.E.3d at 262 (citing *Brantley v. State*, 91 N.E.3d 566, 570 (Ind. 2018), *cert. denied*). "We will affirm a conviction if there is substantial evidence of probative value that would lead a reasonable trier of fact to conclude that the defendant was guilty beyond a reasonable doubt." *Id.* at 263. We affirm the conviction "unless no reasonable fact-finder could find the elements of the

[3] Sexton argues that the evidence is insufficient to sustain his convictions for Counts I, III, VIII, and XI, which were the neglect of a dependent charges. Although the jury found Sexton guilty as charged, Sexton was only convicted of Count I, neglect of a dependent, a Level 1 felony. Thus, we consider whether the evidence is sufficient to sustain that conviction only.

crime proven beyond a reasonable doubt. It is therefore not necessary that the evidence overcome every reasonable hypothesis of innocence. The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict." *Sutton v. State*, 167 N.E.3d 800, 801 (Ind. Ct. App. 2021) (quoting *Drane v. State*, 867 N.E.2d 144, 146-47 (Ind. 2007)).

[18] The offense of neglect of a dependent is governed by Indiana Code Section 35-46-1-4(a), which provides:

> A person having the care of a dependent, whether assumed voluntarily or because of a legal obligation, who knowingly or intentionally:
>
> (1) places the dependent in a situation that endangers the dependent's life or health;
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> * * * * *
>
> commits neglect of a dependent[.]

The offense is a "Level 1 felony if it is committed under subsection (a)(1), (a)(2), or (a)(3) by a person at least eighteen (18) years of age and results in the death or catastrophic injury of a dependent who is less than fourteen (14) years of age . . . ." Ind. Code § 35-46-1-4(b)(3).

[19] Sexton argues that the evidence is insufficient to demonstrate that he **knowingly** placed J.S. in a situation that endangered his life. "A person engages in conduct 'knowingly' if, when he engages in the conduct, he is aware of a high probability that he is doing so." Ind. Code § 35-41-2-2(b). The *mens rea* requirement of the neglect statute requires proof that a defendant possessed

"a subjective awareness of a 'high probability' that a dependent had been placed in a dangerous situation." *Marksberry v. State*, 185 N.E.3d 437, 442 (Ind. Ct. App. 2022) (quoting *Shultz v. State*, 115 N.E.3d 1280, 1286 (Ind. Ct. App. 2018)), *trans. denied*. "[B]ecause, in most cases, such a finding requires the factfinder to infer the defendant's mental state, this Court must look to all the surrounding circumstances of a case to determine if a guilty verdict is proper." *Id.* "The danger to the dependent must be 'actual and appreciable.'" *Id.* (quoting *Perryman v. State*, 80 N.E.3d 234, 250 (Ind. Ct. App. 2017)).

[20] The State presented evidence that, although Sexton's one-year-old child was living with him and his four-year-old child often visited, Sexton owned multiple guns and was dealing drugs. Sexton occasionally left the firearms around the house, sometimes within the children's reach. Hosea had complained to Sexton about his behavior. On June 18, 2020, Sexton's four-year-old child found a loaded firearm, which did not have a safety lock, and shot Sexton's one-year-old child at close range, killing him.

[21] Sexton's claim that there "was no evidence to show how or where or when [A.S.] came into possession of the handgun" is merely a request that we reweigh the evidence or judge the credibility of the witnesses, which we cannot do. Appellant's Br. p. 9. Despite warnings not to do so, Sexton left a loaded handgun, without a safety lock, in reach of his young children, which resulted in the death of his one-year-old child. The State presented sufficient evidence to demonstrate that Sexton knowingly placed J.S. in a situation that endangered his life and resulted in J.S.'s death. Accordingly, the evidence is sufficient to sustain Sexton's conviction for neglect of a dependent, a Level 1 felony. *See,*

e.g., *Marksberry*, 185 N.E.3d at 444 (holding that the evidence was sufficient to sustain a mother's conviction for neglect of a dependent resulting in death where she left the child with the child's father who was abusing drugs and was known to be violent and suicidal).

Conclusion

[22] The trial court did not abuse its discretion by denying Sexton's motion for severance, and the evidence is sufficient to sustain his conviction for neglect of a dependent, a Level 1 felony. Accordingly, we affirm.

[23] Affirmed.

Bailey, J., and Kenworthy, J., concur.